REPUBLIC OF KENYA

IN THE COURT OF APPEALOF KENYA AT NAIROBI

Civ Appli 73 of 2006

KAIRU ENTERPRISES LTD …..…………….…….. 1ST APPLICANT

MRS LUCY W. KAIRU ……..………………………. 2ND APPLICANT

LUCY W. KAIRU (Suing as the administratrixof the Estate of the

Late Hon. Munene Kairu) …..............................…… 3RD APPLICANT

AND

HOUSING FINANCE CO. OF KENYA LTD …….. RESPONDENT

(Application for an injunction pending the hearing and determination of an intended appeal from the ruling and order of the High Court of Kenya at Nairobi (Ransley, J) dated 23rd November, 2005

in

H.C.C.C No. 528 of 2005)

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RULING OF THE COURT

The second applicant in this notice of motion, **Mrs. Lucy W. Kairu**, is the Managing Director of the first applicant, **Kairu Enterprises Limited**. She is also the administratrix of the estate of the late Hon. Munene Kairu, and in that capacity, she is the third applicant. The second applicant and the late Munene Kairu were the two directors of the first applicant. The first applicant applied for and obtained a loan of **Ksh.4,500,000/=** from the respondent, **Housing Finance Company of Kenya Limited**. A letter of offer for that loan is dated 10th May, 1995. That letter of offer was signed by David Munene Kairu and the second applicant, Lucy Wangechi Kairu, on 15th May 1995 and it contained nine special conditions. For purposes of this ruling, condition number seven may be cited. It states:

“**The offer is subject to a life insurance quotation from ICEA.”**

Apart from the nine special conditions in the letter of offer dated 10th May, 1995, there was another letter which was addressed to the first applicant but which was apparently also signed by David Munene Kairu and Lucy Wangechi Kairu. It is headed **ADDITIONAL SPECIAL CONDITIONS**. Those conditions are described as “***attached to and form part of the offer to advance and MUST be fully complied with before any further action is taken*”** (underlining supplied). Conditions No. 5 (b) and (c) state that the offer was subject to the applicant depositing:

"**(b) Annual Fire Insurance Premium of Ksh. 12,000/=.**

(c) Annual Life Insurance Premium of Ksh.51,060/=."

There was a rider to these additional special conditions and it stated:

> "**NB: The amounts under 5 will be credited to your mortgage account on completion of the mortgage."**

As we have stated, that Additional Special Condition was also signed by both the second applicant and David Munene Kairu. The loan was then processed and property known as L.R. No. 9509/41 Mirema Road, Ruaraka was charged to the respondent to secure the loan. The second applicant and David Munene Kairu guaranteed the repayment of the loan advanced to the company. The charge was dated 2nd June, 1995, but before that date, on 17th May, 1995, the first applicant wrote to the respondent and sought two changes: first that the insurance company at special condition No. 7 be changed to read Madison Insurance Company instead of ICEA, and second that the Advocate preparing the charge be Kibuchi & Company. Apparently, that request was accepted by the respondent for the charge was prepared by J. M. Kibuchi, Advocate and in a letter dated 7th July, 1995 addressed to the first applicant, the respondent wrote to the first applicant telling it that the insurance quotation had not been forwarded to them (respondent) by Madison Insurance Company Limited. However, in that same letter, the respondent also told the first applicant that its mortgage had been completed. There is on record a copy of the proposal form for Life Assurance which was apparently filed and signed by David Munene Kairu. The record thus shows that David Munene Kairu insisted that he took life insurance in respect of the mortgage.

Apparently, no problems arose between the parties as regards the mortgage when David Munene Kairu was still alive. On 1st April, 1998, David Munene Kairu passed on. Immediately after the demise of David Munene Kairu (deceased), the respondent was informed of the death and asked to arrange with their insurance (as the applicants believed the policy was held by the respondent) to take over the loan facility and discharge the mortgaged property. Vide a letter dated 7th October, 1998, the respondent wrote to the first applicant stating that the insurers had declined the claim because the deceased did not comply with the medical requirements as laid out by the insurance company and hence the loan was still alive and had to be serviced. This did not satisfy the applicants who were aware all along that the directors of the first applicant had taken life insurance cover and there were documents to show that the deceased had satisfied the medical requirements. The applicants and the respondent then carried out several negotiations and correspondence on the matter with the applicants insisting that taking out insurance cover was a precondition of the mortgage and that being so, the mortgage could only have been completed on the respondent being satisfied that the directors were covered. The respondent on the other hand insisted that no cover was in place. When the negotiations failed to yield any fruit for the applicants, they moved to the superior court by way of a plaint dated 23rd September, 2005 against the respondent. In that plaint, they sought mainly two orders namely, an order of injunction to restrain the respondent from alienating or selling or in any way dealing adversely or otherwise with all that property known as L.R No. NRB/9509/41 Mirema Road, Ruaraka and a mandatory injunction order to compel the respondent to discharge the first applicant's mortgage property L.R. No. NRB/9509/41 Mirema Road, Ruaraka. They also sought costs of that suit. Together with that plaint, the applicants filed chamber summons under certificate of urgency in which, after seeking dispensation with service on the first instance, they sought only one order and that was:

> "**That pending the hearing and determination of this suit, the defendant by themselves (sic), their servants, agents or whosoever be restrained by way of an injunction from selling, disposing, transferring, alienating or in any other way adversely dealing with that property known as L.R. No. 9509/41 Mirema Road, Ruaraka."**

That application was heard by the superior court (Ransley, J). In dismissing it in a ruling delivered on 23rd November, 2005, the learned Judge stated, *inter alia*, as follows:

"**The Applicants' contention is that it is due to the fault of the respondent that the deceased was not covered, which could have led to the insurance monies being used to reduce the 1st Applicant's indebtedness.**

The respondent contended, however, that it was the fault of the deceased that cover was not in place when he died.

It must be borne in mind that the debtor is the 1st applicant and not the deceased. It was the 1st applicant, which still exists which borrowed the money and agreed to repay it on the charge. I do not see that the death of the deceased obviated the 1st applicant's obligation to pay.

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If there was negligent (sic) or fraud on the part of the respondent then the applicants' remedy is in damages. I do not see that it removes the applicant's obligation to pay back what it borrowed nor do I see that it stops the respondent from exercising its statutory power of sale.

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In my view, the applicants have not shown they have a prima facie case. Their remedy in my view depends upon the applicants proving that the respondent was either negligent or fraudulent and lies in damages. This is a collateral matter and does not affect the 1st applicant's obligation to pay.

In the result I dismiss this application with costs to the respondent."

The applicants were aggrieved by that ruling and intend to appeal against it. They filed a notice of motion under **Order 41 rule 4(1) (2)** and **(6)** of the Civil Procedure Rules in the superior court seeking an injunction to enable them to file an appeal to this Court. The superior court (Ransely, J) granted the injunction but on condition. The learned Judge stated:

"**In this case, I will grant injunction sought for on condition that the applicants pay into an interest bearing account in the names of the parties' advocates within 30 days from today a sum of Ksh. 9 million being the sum due to the respondent as at the 31.12.2004."**

That order was given on 21st February, 2006. On the same date, the applicants, being still aggrieved, filed a notice of appeal in this Court and on 15th March, 2006, this notice of motion was filed. It is brought under **rules 5(2) (b)** and **42** of the Court of Appeal Rules (the **Rules**). Apart from an order for costs, it is seeking an order that:

"**(a) That there be stay of execution in form of an injunction and the respondent by themselves, their servants, agents or whosoever be restrained by way of an order of injunction from selling, disposing, transferring, alienating or in any other way adversely dealing with that property known as L.R No. 9509/41 Mirema Road, Ruaraka, pending the filing, hearing and determination of the intended appeal."**

Before us, Mr. Ngunjiri, the learned counsel for the applicants, stated that the applicants were seeking an injunction and not a stay. The reasons in support of the notice of motion are that the intended appeal against the superior court's decision of 23rd November, 2005 was arguable as the learned Judge of the superior court did not, in his view, appreciate the fact that a life insurance was and is intended to assist the bereaved in satisfying debts which but for the death of the insured borrower or guarantor would have been paid, and that the learned Judge did not consider the reason why the respondent insisted that even though the deceased was only a guarantor, his life had to be insured as a prerequisite for the first applicant, in

which he was a director, being advanced a loan.

Mr. Issa, the learned counsel for the respondent, on the other hand emphasized the respondent's case as stated in its replying affidavit that there was no condition precedent set as alleged by the applicants that the deceased had to take out insurance cover for the loan as the deceased was only a guarantor and not the borrower, and that in any event, the deceased did not avail himself for medical examination so that at the end of it all, the deceased was not insured either by ICEA or Madison Insurance Company; and finally, that the need for insurance for the deceased was a personal initiative by the deceased and the respondent was not involved in the application for a mortgage protection policy to the said company, as the respondent was in the dark about that personal initiative of the deceased. There was no communication between the respondent and Madison Insurance Company Limited on it.

The above were the brief facts giving rise to the notice of motion before us and the rival arguments of both parties before us. As we have stated, the notice of motion is brought under **rule 5(2) (b)** of the Rules. As it has been stated on numerous occasions, the jurisdiction exercisable by this Court under **rule 5(2) (b)** is both original and discretionary. It is now trite law that for an applicant to succeed under that rule, he must demonstrate to the satisfaction of the Court, first, that the appeal or intended appeal is arguable and secondly, that if the application is refused and his appeal or intended appeal eventually succeeds, the results would be rendered nugatory – see the cases of **J.K. Industries Ltd. vs. Kenya Commercial Bank Ltd. (1982 - 88) 1 KAR 1088**, **Reliance Bank Limited (In Liquidation) vs. Norlake Investments Ltd**. **- Civil Application No. 98 of 2000 (unreported)** and **Githunguri vs. Jimba Credit Corporation Ltd. (No. 2) (1988) KLR 838**. Those two principles will of course, be considered against the facts and circumstances of each case.

We have considered the facts in the application that was before the superior court, the documents that are on record, the affidavits by both parties, the law as well as the submissions by both counsel. We have considered the contents of the letter of offer, particularly the special conditions spelt out therein together with the additional special conditions and the effects of all the conditions in that letter upon the entire Mortgage Agreement. We have considered the letters exchanged between the parties themselves as well as those involving third parties such as Insurance Companies and Insurance Brokers in the matter together with premium payments and refund of the same such as is evidenced in a letter dated 12th June, 2003 from the respondent to the first applicant. In our view, the question as to whether the life insurance upon the deceased, David Munene Kairu, was a prerequisite for granting of advance to the first applicant and the effect of the delay by the respondent in informing the first applicant and the deceased that such cover was never processed if it was not indeed processed while premiums for it were being paid and being returned to the respondent, are matters that are not frivolous. In short, the allegations of fraud or negligence on the part of the respondent are matters that need to be ventilated. They are arguable matters.

The above being our view of the matter, will the results of the intended appeal, if successful, be rendered nugatory? We are aware that the superior court granted an injunction on condition that the applicants deposit Ksh.9,000,000/= into an interest bearing account held by both parties' advocates. The applicants found that condition onerous and felt that it amounted to a denial of an injunction. We cannot fault them for that. That order for deposit was based on the balance as it stood then. It must be much higher than that now and if the property were to be sold, it is possible, as Mr. Ngunjiri says, that the sale may not realise the entire amount outstanding with the result that the balance might be the subject of another suit. That might mean that damages may not be adequate in the circumstances of the case. Further, from the facts and circumstances of this case, we do not feel justice to both parties would be met by sale of the property. On the facts and circumstances of this case, allowing the property to be sold may possibly mean allowing a party to breach the terms of a contract on the mere pretext that eventually it is in a position to pay damages. That cannot be the purport of justice. We are of the view that the property should be preserved till the intended appeal is heard and finally decided.

That being our view of the matter, we make an order that the respondent, Housing Finance Company of Kenya Limited, by itself, its servants, agents or whosoever are restrained by an order of injunction from selling, disposing of, transferring, alienating, or in any other way adversely dealing with the property known as L.R. No. 9509/41, Mirema Road, Ruaraka, pending the filing, hearing and

determination of the intended appeal. Costs in the intended appeal.

Dated and delivered at Nairobi this 1st day of December, 2006.

S.E.O BOSIRE

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JUDGE OF APPEAL

P.N. WAKI

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JUDGE OF APPEAL

J.W. ONYANGO OTIENO

…………………………

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR